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No. 96 733

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

STAFF SERGEANT LYNDON M. VAUGHTERS,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

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PETITION FOR WRIT OF CERTIORARI

W. CRAIG MULLEN
Captain, United States Air Force
Appellate Defense Division
Counsel of Record

MICHAEL L. MCINTYRE
Captain, United States Air Force
Appellate Defense Counsel
Counsel for the Petitioner

Air Force Legal Services Agency
Appellate Defense Division
172 Luke Avenue, Suite 343
Bolling AFB, DC 20332-8000
(202) 767-1562

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Armed Forces erred when it held that the bright line rule enunciated in *Edwards v. Arizona* does not apply to a custodial interrogation after there has been a break in custody between custodial interrogations.

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The petitioner, Staff Sergeant Lyndon M. Vaughters, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in his case on 30 August 1996.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces, reported at No. 95-0899, —— M.J. —— (30 August 1996), is located at Appendix A. The opinion of the United States Air Force Court of Criminal Appeals as reported at 42 M.J. 564 (AF Ct. Crim. App. 1995), is located at Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on 30 August 1996. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1259(3) (West Supp. 1996) and 10 U.S.C.A. § 867 (a) (West Supp. 1994).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the Constitution of the United States provides in relevant part:

> No person shall . . . be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

On 10 February 1993, Air Force Security Police investigators, after advising petitioner of his rights under Article 31(b), Uniform Code of Military Justice (UCMJ), 10 U.S.C.A. § 831, questioned petitioner about his involvement with illegal drugs. Petitioner requested counsel, but agreed to provide a urinalysis sample. The sample tested positive for the metabolite of cocaine. As a result of the positive urinalysis, agents of the Air Force Office of Special Investigations (AFOSI) told petitioner to report to the AFOSI office on 1 March 1993. The petitioner re-

ported to the AFOSI, was read again his Article 31 rights,[1] and confessed to using cocaine. The AFOSI agents were unaware that petitioner had previously requested an attorney and invoked his rights under the Fifth Amendment to the Constitution. In both cases, the petitioner's questioning by the security police and AFOSI agents took place while the petitioner was in custody.

On appeal to the Air Force Court of Criminal Appeals, the Air Force Court held that petitioner's break in custody between the time he was questioned by the security police and the time he was questioned by the AFOSI made the rule enunciated by this Court in *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), *rehearing denied*, 452 U.S. 973, 101 S.Ct. 3128, 68 L.Ed.2d 984 (1981), inapplicable. On appeal to the Court of Appeals to the Armed Forces, that Court agreed and specifically stated that "[f]inally, we continue to be persuaded that *Edwards* and its progeny did not intend to preclude further interrogation by police where a suspect has been provided what *Schake*[2] describes as 'real opportunity to seek legal advice.' " *United States v. Vaughters*, No. 95-0899, —— M.J. —— (30 August 1996). This opinion is contrary to what *Minnick v. Mississippi*, 498 U.S. 146, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990) stated is the purpose of the *Edwards* bright line rule—to protect an accused's right to have counsel present at a custodial interrogation once an accused has asked for counsel. The Court of Appeals for the Armed Forces mentioned this purpose in *Vaughters* when it noted that the purpose of *Edwards* was "to protect the suspect's right to have counsel present at custodial interrogation." *Vaughters, supra.*

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[1] Under Article 31, servicemembers are advised of their right to counsel and 5th Amendment right to remain silent when they are simply suspected of a crime, whether or not they are in custody. The rights which were given are essentially the same as *Miranda* rights. However, appellant was in custody.

[2] *United States v. Schake*, 30 M.J. 314 (CMA 1990).

REASON FOR GRANTING THE WRIT

THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES ERRED WHEN IT HELD THAT THE BRIGHT LINE RULE ENUNCIATED IN *EDWARDS v. ARIZONA* DOES NOT APPLY TO A CUSTODIAL INTERROGATION AFTER THERE HAS BEEN A BREAK IN CUSTODY BETWEEN CUSTODIAL INTERROGATIONS.

In *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), *rehearing denied*, 452 U.S. 973, 101 S.Ct. 3128, 69 L.Ed.2d 984 (1981), this Honorable Court established a bright line rule for police officers to follow when a suspect has invoked his right to have counsel present during a custodial interrogation: a suspect is not subject to "further interrogation by the authorities until counsel has been made available to him, unless the suspect himself initiates further communication, exchanges, or conversations with the police." *United States v. Vaughters*, 42 M.J. 564, 565 (AF Ct. Crim. App. 1995); *United States v. Kelsey*, 951 F.2d 1196 (10th Cir. 1991). Not only did *Edwards* establish this bright-line rule, it also established the two exceptions to this bright-line rule: no further questioning is allowed unless the suspect has initiated the further communication or an attorney is present. This Honorable Court did not establish a "voluntariness" of the confession standard, nor did this Court in *Edwards* specifically limit the rule to situations where there had been no break in custody, although the Court did state that "We reconfirm these views and, to lend them substance, emphasize that it is inconsistent with *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel." *Edwards, supra*, at 451 U.S. 485.

In the case of *Minnick v. Mississippi*, 498 U.S. 146, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990), the Supreme Court had to once again re-visit its *Edwards* ruling be-

cause a lower court had interpreted *Edwards* to mean only that counsel must be made *available* to a suspect prior to any further custodial interrogation. *Minnick,* at 489. In an opinion authored by Justice Kennedy, the Supreme Court made clear that the lower court had misinterpreted the holding in *Edwards. Edwards* had always stood for the proposition that once a Fifth Amendment right to counsel had been invoked, questioning ceased until an attorney was present at any subsequent interrogation.[3] The Court noted:

> *Edwards* is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda*[4] rights." (citations omitted). The rule ensures that any statement made in subsequent interrogation is not the result of coercive pressures. *Edwards* conserves judicial resources which would otherwise be expended in making difficult determinations of voluntariness, and implements the protections of *Miranda* in practical and straightforward terms.

In *Minnick,* this Court was urged to adopt an exception to its bright line rule. It declined to do so, stating that an exception "would undermine the advantages flowing from *Edwards*' 'clear and unequivocal' character." The *Edwards* rule sets forth a specific standard to fulfill these purposes, and we have declined to confine it in other instances." *Minnick,* at 492 (citations omitted). It is clear from the *Minnick* opinion that the *Edwards* bright line rule is just that, a bright line not to be muddied with analysis of voluntariness.[5]

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[3] The military judge at petitioner's court-martial had opined that the Supreme Court, in *Minnick,* had "expanded" the rule of *Edwards.* (R. 25). Clearly, *Minnick* shows the Supreme Court did no such thing. The Court simply corrected the misinterpretation of the lower courts.

[4] *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

[5] In fact, in dissent, Justice Scalia argued why a State could "not be given the opportunity to prove (under *Zerbst*) that the

In the case *sub judice*, the Air Force Court of Criminal Appeals and the Court of Appeals for the Armed Forces abandoned this bright line rule and conducted a voluntariness analysis, apparently for the sole reason that the petitioner had been "free" from custody between the dates of 10 February and 1 March. Despite the clear and unequivocal condemnation by the Supreme Court of the use of a voluntariness standard, the Air Force Court of Criminal Appeals in the case *sub judice* stated: "[w]e believe such a result is neither required nor would further the purpose of the rule." *Vaughters*, at 566. The Air Force Court stated that petitioner had been released from custody for 19 days, was not badgered by police, had sought legal counsel for previous matters, and did not contact an attorney for assistance. In its opinion, the Court of Appeals for the Armed Forces agreed with this analysis. However, none of these factors were relevant to the Supreme Court's analysis in *Minnick*. In *Edwards/Minnick*, the Supreme Court adopted no requirement that a suspect had to be "badgered" by police between interrogations, before the Fifth Amendment protection would apply. The Supreme Court specifically stated that the fact that the suspect in *Minnick* had consulted with an attorney between interrogations was not controlling. *Minnick*, at 492. Further, the Supreme Court did not state that the *Edwards* rule was specific only to situations in which there had been no break in custody. Despite ample opportunity to specifically adopt such a rule, the Supreme Court did not do so. Finally, the "purpose" of the *Edwards* rule as stated by the Air Force Court of Criminal Appeals and the Court of Appeals for the Armed Forces, is appellant believes, incorrect. The purpose of the *Edwards* rule was

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right was voluntarily waived by a suspect who, after having been read his *Miranda* rights twice and having consulted counsel at least twice, chose to speak to a police officer (and to admit his involvement in two murders), without counsel present." *Minnick*, at 495. It is clear that the dissenters believed the majority opinion had rejected any voluntariness analysis.

spelled out quite clearly by the Supreme Court in *Minnick*: "The exception to *Edwards* here proposed is inconsistent with *Edwards*' purpose to protect the suspect's right to have counsel present at custodial interrogation." *Minnick*, at 491. The Air Force Court of Criminal Appeals further stated that "We do not believe the Supreme Court meant to find an accused in appellant's position to be under such 'inherently compelling pressures' as to need any special protection." (Appendix). But, a clear reading of *Minnick* and other cases from this Honorable Court show that is exactly what this Court intended.

In *Solem v. Stumes*, 465 U.S. 638, 104 S.Ct. 1338, 79 L.Ed.2d 579 (1984), the Supreme Court reaffirmed the *per se* rule of *Edwards*: *"Edwards* established a *new test* for when that waiver [of counsel] would be acceptable once the suspect had invoked his right to counsel: the suspect had to initiate subsequent communication." (Emphasis added). The Supreme Court in *Solem* declined to apply *Edwards* retroactively, finding that under conflicting case law prior to *Edwards* it would have been justifiably believed that a "waiver of the right to counsel following its invocation could be voluntary even if the police initiated the conversation." *Id.* at 1344. In a concurring opinion, Justice Powell recognized the *per se* rule of *Edwards*:

> In *Edwards*, although concurring in the judgment, I expressed concern as to whether there was an intent to overrule *Zerbst*. See 541 U.S. at 491-492, 101 S.Ct., at 1880-1889. In *Bradshaw*, last Term, in an opinion also concurring only in the judgment, I reiterated my conviction that the Constitution requires no *per se* rule on an issue as purely factual as whether and when a valid waiver of counsel occurs. 462 U.S., at 1049-1051, 103 S. Ct., at 2838. As the contrasting opinions of Justices MARSHALL and REHNQUIST in *Bradshaw* illustrate, even the new *per se* rule is more likely to confuse than to clarify. See, *id.*, at 1048, 103 S. Ct., at 2836, and 2837 (POWELL,

> J., concurring in judgment). Nevertheless, I now, of course, accept *Edwards* and *Bradshaw* as binding authority.

Solem, n. 1 at 1346.

In the case *sub judice*, petitioner's 19 days of "freedom" between custodial interrogations is unimportant because, as *Edwards* and *Minnick* made clear, it is the custodial interrogation itself that is inherently coercive. Petitioner was placed in custody again on 1 March 1993, after he was led to believe that the invocation of his right to counsel would preclude police from requestioning him. The inherently coercive atmosphere of custodial interrogation began all over again. His 19 days of freedom prior to 1 March 1993 had no more bearing on this fact than his *35 years* of freedom prior to the 1 February 1993 custodial interrogation. "It is inconsistent as well with *Miranda*, where we specifically rejected respondent's theory that the opportunity to consult with one's attorney would substantially counteract the compulsion created by custodial interrogation. We noted in *Miranda* that '[e]ven preliminary advice given to the accused by his own attorney can be swiftly overcome by the secret negotiation process.'" *Minnick*, at 491. If consulting with an attorney while in custody and being informed of constitutional rights does not abrogate the *Edwards* rule, then neither can being free for a few days before again being interrogated, but having never consulted with an attorney, abrogate the rule.

The military judge and the Courts below also relied on *dicta* by Justice Scalia in *McNeil v. Wisconsin*, 501 U.S. 171, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991). *McNeil* was decided just 7 months after *Minnick*. *McNeil* dealt with an accused's request for counsel under the Sixth Amendment, at a bail hearing. *McNeil*'s attorney argued that his client's request at a bail hearing for counsel should have carried over when he was subsequently questioned by the police about a different crime. The Supreme Court declined to go that far, noting that a suspect's invocation

of his Sixth Amendment right did not constitute an invocation of the right to counsel derived by *Miranda v. Arizona,* under the Fifth Amendment's guarantee against compelled self-incrimination. *McNeil,* at 2207-2211. The Supreme Court noted that the Sixth Amendment right to counsel was "offensive specific" and did not apply to all future prosecutions. *Id.* at 2207. The *dicta* relied upon in *McNeil* by the trial counsel at appellant's trial and the military appellate courts was a parenthetical added by Justice Scalia in discussing the *Edwards* rule: ("assuming there is no break in custody)." *Id.* at 2208. Justice Scalia went on to reiterate what *Edwards* unequivocally stood for: "[o]nce a suspect invokes the *Miranda* right to counsel for interrogation regarding one offense, he may not be reapproached regarding *any* offense unless counsel is present." *McNeil,* at 2208. (Emphasis in original). In short, there was no need for any express discussion in *McNeil* regarding the issue as to whether or not *Edwards'* bright line rule applied only to situations in which there was no break in custody because the rule is not restricted to such situations.

The Air Force Court of Criminal Appeals stated that the parenthetical cited above in *McNeil* "suggested" that the *Edwards* bright line rule applied only when there had been no break in custody. *Vaughters,* at 567. In *Arizona v. Roberson,* 486 U.S. 675, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988), the Supreme Court held that further questioning of a suspect about a *different* crime three days after he had invoked his right to counsel was improper. Common sense dictates that if questioning of a suspect about a *different* crime is not an exception to the *Edwards* bright-line rule, neither should the questioning of a suspect about the *same crime* after a break in custody be an exception to the bright-line rule. It is the coerciveness of custody itself that the *Edwards/Minnick* cases are concerned about. A few days of freedom between custodial interrogations does not lessen that coerciveness.

The Supreme Court's clear guidance in *Minnick* and disapproval of any voluntariness analysis was further evidenced by its decision in *Davis v. United States,* 512 U.S. 452, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994). *Davis* dealt with a military member invoking his right to counsel during an interrogation. The Supreme Court reiterated that "if a suspect requests counsel at any time during the interview, he is not subject to further questioning until a lawyer has been made available or the suspect himself reinitiates conversation." *Id.* at 2355. The Supreme Court further noted that "The applicability of the 'rigid prophylactic rule' of *Edwards* requires courts to "determine whether the accused *actually invoked* his right to counsel." *Id.* at 2355 (citations omitted, emphasis in original). Thus, it is clear that courts are to determine only the factual question as to whether an accused has invoked his right to counsel and not, if he did, a determination that any subsequent interrogation in violation of *Edwards* and *Minnick* is nonetheless voluntary.

The voluntary analysis by the Air Force Court of Criminal Appeals and the Court of Appeals for the Armed Forces in petitioner's case, relying on the fact that petitioner had not been in continual police custody between the two custodial interrogations, would bring about discriminatory, unfair, and absurd results. A suspect who can afford bail and is released prior to being re-questioned in custody by police (but does not consult with an attorney while free) would not receive the Constitutional protection of the Fifth Amendment as enunciated in *Edwards.* A suspect who could not afford bail, or was not released by the police, and remained in custody but consulted with his attorney, receives the Fifth Amendment Constitutional protection. *Minnick, supra.* The break in custody exception also allows law enforcement personnel to circumvent the *Edwards* bright line rule by simply releasing a suspect for a period of time before attempting to question him or her again. The law should not operate in this haphazard and discriminatory manner.

Further, petitioner fails to see how being released from custody for a few days makes a subsequent custodial interrogation that is not initiated by an accused and is held without his attorney present is less coercive than a continuing custody situation. In petitioner's case, he was in custody at the time that questioning was re-initiated by the AFOSI. As such, being in custody, the *Edwards* bright-line rule applied.

The Court of Appeals for the Armed Forces cited with approval decisions from other Federal Courts of Appeals, decided after this Court's opinion in *Minnick*. As noted, *Minnick* is an important decision in the *Edwards* analysis, for it clarified and reaffirmed the purpose of the *Edwards* rule: to protect the suspect's right to have counsel present at a custodial interrogation. *Minnick, supra*, at 154. Thus, in *Minnick*, it was unimportant that the suspect, after invoking his right to have an attorney present, was able to consult with an attorney prior to being requestioned. The cases cited by the Court of Appeals for the Armed Forces were decided after *Minnick*, but their opinions rely on pre *Minnick* decisions and do not discuss the importance of the *Minnick* decision. The decisions cited by the Court below continue to rely on a mistaken belief that mere access to an attorney is enough, which a break in custody supposedly allows, instead of the fact that the presence of the attorney during the custodial interrogation is what *Edwards* is designed to protect. *United States v. Hines*, 963 F.2d 255 (9th Cir. 1992) (relies on case from 1982 for its proposition that *Edwards* rule does not apply in break in custody situations); *United States v. Barlow*, 41 F.3d 935 (5th Cir. 1994), *cert. denied*, —— U.S. ——, 115 S.Ct. 1804, 131 E.Ed.2d 241 (1995) (relies on *Dunkins v. Thigpen*, 854 F.2d 394 (11th Cir. 1988), *cert. denied*, 489 U.S. 1059, 109 S.Ct. 1329, 103 L.Ed.2d 597 (1989), for proposition that when a suspect is released from custody "the concerns that prompted *Edwards*' prophylatic rule are sufficiently minimized that any *Edwards* violation allegedly founded on those prior

requests simply 'dissolves.' "). *See also McFadden v. Garreghty*, 820 F.2d 654 (4th Cir. 1987) and *United States ex rel Espinoza v. Fairman*, 813 F.2d 117 (7th Cir. 1987), *cert. denied*, 483 U.S. 1010, 107 S.Ct. 3240, 97 L.Ed.2d 745 (1987), which also hold that *Edwards* only applies to continuing custody situations.

The cases from the Federal Circuits holding that a break in custody between custodial interrogations makes *Edwards* inapplicable have held so for two reasons. The first rationale is set forth in *Dunkins, supra*: "If the police release the defendant, and if the defendant has a reasonable opportunity to contact his attorney, then we see no reason why *Edwards* should bar admission of any subsequent statements." *Id.* 854 F.2d 394, at 397. *See United States v. Skinner*, 667 F.2d 1306 (9th Cir. 1982) (Skinner "had opportunity to contact a lawyer or seek advice from friends and family if he chose to do so" because he had been released). However, as discussed, this Honorable Court's later opinion in *Minnick* shows this reasoning to be flawed. As stated, in *Minnick*, the suspect did consult with an attorney between interrogations. However, that matters not, for the purpose of the *Edwards* rule is to protect a suspect's right to have counsel *present* at a custodial interrogation. *Minnick*, 498 U.S. 146, at 154.

The second rationale is discussed in *McFadden, supra*: "Of even greater importance, however, is that appellant was not subjected to continuous custody. There were two breaks in custody which serve amply to sever any causal link between initial unlawful interrogation and appellant's voluntary confessions." 820 F.2d 654, at 661. This reasoning is also flawed. In an *Edwards* type situation, there is no initial unlawful interrogation. What has occurred is simply the fact that a suspect has invoked his or her Fifth Amendment right to counsel and questioning has ceased. It is the second interrogation that is unlawful because the police re-initiate interrogation without counsel present. However, cases such as *McFadden and Espinoza, supra*, hold that a break in custody is

significant because the coercive atmosphere of continuous custody has ended. "The right ends only when the heightened potential for state-coerced self incrimination ends—upon the release of the individual from police custody." *Espinoza*, 813 F.2d 117, at 125.

The coercive atmosphere of police custody does not magically disappear simply because there has been a break in that custody. Indeed, if nothing else, the coerciveness increases. In petitioner's case, petitioner was taken into custody, read his rights, and invoked his Fifth Amendment right to counsel. He was released, as is normally done in the military, since bond does not exist. Nineteen days later, he was brought back into custody, read his rights, and re-questioned. He was once again "in custody." This second custody was not less coercive than the first, and was in fact probably more coercive because petitioner was led to believe that his right to counsel, once he asserted it, would be respected and the police would not question him again until he wanted them to. His release from initial custody heightened this belief. Yet, his Fifth Amendment right to counsel was not complied with and he was hauled back into custody to be questioned again. The purpose of the *Edwards* rule does apply to such a situation and a break in custody is unimportant. Petitioner's attorney was not present during the second custodial interrogation. The state of mind of petitioner was the same in both custodial interrogations. *Roberson, supra.* The right the *Edwards* rule was designed to protect was not protected. The coercive atmosphere of custody that concerned this Honorable Court in *Edwards* was present in appellant's case when he was again placed into custody by the police. As this Honorable Court stated in *Roberson, supra*, "As a matter of law, the presumption raised by a suspect's request for counsel—that he considers himself unable to deal with the pressures of custodial interrogation without legal assistance—does not disappear simply because the police have approached the suspect, still in custody, still without

counsel present, about a separate investigation." 486 U.S. 675, at 683. Likewise, the presumption doesn't disappear simply because the police let a suspect go free for a few days, again takes him into custody and questions him about the same investigation, still without counsel present.

Finally, it might be argued that the *Edwards* rule should not apply in the appellant's case because the AFOSI agent who questioned appellant did not know appellant had invoked his right to counsel when questioned by the security police. However, this Honorable Court in *Roberson* clearly held that "the fact that the officer who conducted respondent's second interrogation did not know that he had requested counsel cannot justify the failure to honor that request, since *Edwards* focuses on the state of mind of the suspect and not of the police, and the officer could have discovered the request simply by reading the arresting officer's report." *Roberson, supra,* at 687.

CONCLUSION

In his argument on the motion to suppress the appellant's confession, trial defense counsel stated the following:

> Finally, I think you have to look at the purpose of the *Edwards* and *Minnick* rule, and I would respectifully (sic) disagree with the prosecution when they say that the purpose of the *Edwards* and *Minnick* rule is to prevent the police from badgering suspects into confessing. I would say that that is the purpose of the *Miranda* rule. Justice Kennedy (sic) makes quite clear in the *Minnick* decision that the purpose of *Edwards* is to try and provide a rule that will settle this issue and will keep us hopefully from having to come into court and litigate issues like this and litigate issues like was the confession voluntary or not and setup a bright-line rule.
>
> Now if we're going to go into a situation where we start saying, "Well after some time, after an accused

> leaves one interview in the military context, his right to counsel is no longer effective." (sic) we throw that purpose of *Edwards* and *Minnick* out the window because there's no bright-line rule any more (sic) because how many days is enough? Is three days enough? Is six days enough as the *Schake* case found? Does it require 19 days? Does it require 28 days like the *Flynn* [6] Court said? Where do we draw the line?

(R. 19, 20).

"Where do we draw the line" is a good question. *Minnick* answered that question in reaffirming the bright line rule of *Edwards*: "The merit of the *Edwards* decision lies in the clarity of its command and the certainty of its application." *Minnick*, at 490.

Respectfully submitted,

W. CRAIG MULLEN
Captain, United States Air Force
Appellate Defense Division
Counsel of Record

MICHAEL L. MCINTYRE
Captain, United States Air Force
Appellate Defense Counsel
Counsel for the Petitioner

Air Force Legal Services Agency
Appellate Defense Division
172 Luke Avenue, Suite 343
Bolling AFB, DC 20332-8000
(202) 767-1562

November 1996

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[6] *United States v. Flynn*, 34 M.J. 1183 (AFCMR 1992).

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

No. 95-0899
Crim. App. No. 30799

UNITED STATES,

Appellee

v.

LYNDON M. VAUGHTERS, Staff Sergeant
U. S. Air Force,

Appellant

Argued February 29, 1996
Decided Aug. 30, 1996

OPINION OF THE COURT

SULLIVAN, Judge:

Appellant was tried by a military judge sitting alone at Nellis Air Force Base, Nevada, in June of 1993. Contrary to his pleas, he was found guilty of wrongfully using cocaine, in violation of Article 112a, Uniform Code of Military Justice, 10 USC § 912a. The judge sentenced him to a bad-conduct discharge, confinement for 6 months, forfeiture of $300.00 pay per month for 8 months, and reduction to E-1. The convening authority approved this sentence on August 17, 1993. The Court of Criminal Appeals affirmed on April 26, 1995. 42 MJ 564.

On August 30, 1995, this Court granted review on the following issue:

> WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED IN RULING THAT APPELLANT'S C ONFESSION WAS ADMISSIBLE WHEN LAW ENFORCEMENT AGENTS HAD RE-INITIATED A CUSTODIAL INTERROGATION AFTER APPELLANT HAD REQUESTED COUNSEL.

We conclude that the Court of Criminal Appeals did not err in holding appellant's confession admissible. *See United States v. Schake*, 30 MJ 314, 319 (CMA 1990); *United States v. Barlow*, 41 F.3d 935, 944-46 (5th Cir. 1994).

The facts giving rise to the granted issue were summarized by the appellate court below as follows:

> At trial, the parties stipulated to facts surrounding appellant's confession. On 10 February 1993, Security Police investigators interviewed appellant about his involvement with illegal drugs. When the investigators expressed doubts about appellant's story, appellant requested counsel, but agreed to provide a urine specimen for testing. The interview was terminated and appellant provided the specimen. The urine specimen tested positive for the presence of a metabolite of cocaine. The results of the urinalysis were reported back to the Air Force Office of Special Investigations (AFOSI), rather than the Security Police. Agents of the AFOSI called appellant to their office on 1 March 1993 for an interview. They were unaware that, and apparently did not ask if, appellant had previously invoked his right to counsel. The AFOSI agents advised appellant of his rights to remain silent and to have an attorney. Appellant waived these rights in writing and agreed to be interviewed. Appellant then admitted snorting two lines of cocaine while at a local night club.

42 MJ at 565.

That court further commented on the legal significance of these facts, as follows:

> Although the sweeping language in *Edwards* [*v. Arizona*, 451 U.S. 477 (1981)] would seem to apply to this case, we believe such a result is neither required nor would further the purpose of the rule. Appellant was released from custody immediately after he requested to speak to an attorney. For the next 19 days, appellant was neither in custody nor subject to any other conditions on his liberty, was not badgered by police, was performing duties on an Air Force installation on which two military defense attorneys were located, had sought legal counsel from a military defense counsel for a previous nonjudicial punishment, and did not contact any attorney for assistance with this accusation. We do not believe the Supreme Court meant to find an accused in appellant's position to be under such "inherently compelling pressures" as to need any special protection. We find the AFOSI-initiated interrogation of 1 March 1993 did not violate appellant's right to counsel. *See McNeil v. Wisconsin*, 501 U.S. 171, 176-77, 111 S.Ct. 2204, 2208, 115 L.Ed.2d 158, 167-68 (1991) (suggesting the rule of *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed. 2d 378 (1981) and *Minnick v. Mississippi*, 498 U.S. 146, 111 S.Ct. 486, 112 L.Ed. 2d 489 (1990) applies when there has been no break in custody); *United States v. Flynn*, 34 MJ 1183, 1187-88 (AFCMR 1992).

42 MJ at 566-67.

The granted issue in this case challenges the holding of the Court of Criminal Appeals that *Edwards v. Arizona*, 451 U.S. 477 (1981), did not apply in appellant's case. *See generally Davis v. United States*, —— U.S. ——, 114 S.Ct. 2350 (1994). In *Edwards*, the Supreme Court held that once an individual in custody asserts his right to counsel under the Fifth Amendment all interrogation

must cease until counsel is "made available" or the accused "initiates further communication . . . with the police." *Id.* at 484-85. The service court below held that custodial interrogation may be reinitiated without counsel being present where a suspect had been released from custody for 19 days, provided a meaningful opportunity to consult with counsel, and subsequently waived his right to counsel. We agree with the Court of Criminal Appeals that this holding does not violate *Edwards. See United States v. Schake, supra.*

In *Schake*, this Court addressed the question whether *Edwards v. Arizona, supra*, was applicable in the break-in-custody (6 days) context. A majority of this Court held:

> In any event, assuming appellant was subjected to custodial interrogation on September 18, 1987, we nonetheless hold that his later confession on September 24, 1987, was not barred by *Edwards v. Arizona, supra*. . . .
>
> In deciding that suppression is not necessary, we first note that appellant was released from the police station and allowed unrestricted freedom of movement from September 18 until September 24, 1987. This 6-day break in continuous custody dissolved appellant's *Edwards* claim. *Dunkins v. Thigpen*, [854 F.2d 394 (11th Cir. 1988)] *supra* at 397 (and cases cited therein); *People v. Trujillo*, 773 P.2d 1086, 1092 (Colo. 1989). *See generally Butler v. McKellar*, 494 U.S. 407, 110 S.Ct. 1212, 108 L.Ed.2d 347 (1990). The opinion of this Court in *United States v. Applewhite*, [23 MJ 196 (1987)] *supra* at 199, does not dictate a contrary conclusion. There, evidence concerning "the operation of the local Trial Defense Service" suggested such a release was pretextual or largely ineffective. *Id.* at 199. *See also United States v. King*, 30 MJ 59 (CMA 1990). Here appellant was actually represented by counsel

> on another charge at the time of his release, and it cannot otherwise be said that his release did not provide him a real opportunity to seek legal advice. *See Dunkins v. Thigpen* and *People v. Trujillo*, both *supra*. Finally, when he returned to the station on September 24, 1987, appellant was fully advised of his *Miranda-Tempia* [*see* 16 USCMA 629, 631, 37 CMR 249, 251 (1967)] rights, as well as his right to refuse to take the polygraph examination.

30 MJ at 319 (footnote omitted).

Appellant, nonetheless, suggests that case law establishing such a break-in-custody exception to *Edwards v. Arizona, supra*, has been superceded by the subsequent decision of the Supreme Court in *Minnick v. Mississippi*, 498 U.S. 146, 111 S.Ct. 486 (1990). He asserts that case reaffirmed the bright line or absolute nature of the *Edwards* rule, *i.e.*, precluding any exception for suspects who are released from custody. We disagree for several reasons.

First of all, *Minnick v. Mississippi, supra*, was a continuous-custody case and did not purport to extend the *Edwards* rule to the break-in-custody situation. *See McNeil v. Wisconsin*, 501 U.S. 171, 177 (1991) (dictum suggests *Edwards* not apply where there has been a "break in custody"); *see also United States v. Grooters*, 39 MJ 269, 275 (CMA 1994) (Crawford, J., concurring in the result). Second, Federal civilian Court of Appeals cases continue to adhere to a break-in-custody rule similar to that articulated in *United States v. Schake, supra*, even after the *Minnick* decision. *See United States v. Barlow*, 41 F.3d 935 (5th Cir. 1994); *United States v. Hines*, 963 F.2d 255, 256-57 (9th Cir. 1992); *United States v. Garey*, 813 F.Supp. 1069, 1072-73 (D. Vt. 1993), *aff'd*, 19 F.3d 8 (1st Cir. 1994). Finally, we continue to be persuaded that *Edwards* and its progeny did not intend to preclude further interrogation by police where a suspect has been provided what *Schake* describes as "a real op-

portunity to seek legal advice." 30 MJ at 319. *See Dunkins v. Thigpen*, 854 F.2d 394 (11th Cir. 1988); *United States v. Skinner*, 667 F.2d 1306, 1309 (9th Cir. 1982); *see generally Minnick v. Mississippi, supra* at 154 ("*Edwards*' purpose to protect the suspect's right to have counsel present at custodial interrogation").

The decision of the United States Air Force Court of Criminal Appeals is affirmed.

Chief Judge COX, Judges CRAWFORD and GIERKE, and Senior Judge EVERETT concur.

APPENDIX B

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS
No. ACM 30799

UNITED STATES

v.

Staff Sergeant LYNDON M. VAUGHTERS,
FR200-50-5209
United States Air Force

Sentenced Adjudged 9 June 1993
Decided 26 April 1995

Before
DIXON, YOUNG, and BECKER
Appellate Military Judges

OPINION OF THE COURT

YOUNG, Senior Judge:

The main issue raised in this appeal is how the rule in *Edwards v. Arizona* applies to police-initiated interrogation of a suspect who has not been held in continuous custody between assertion of his right to counsel and the subsequent interrogation.

A military judge convicted appellant of wrongfully using cocaine (Article 112a, UCMJ, 10 U.S.C. § 912a)

and sentenced him to a bad-conduct discharge, confinement for 6 months, forfeiture of $300 pay per month for 8 months, and reduction to E-1. Appellant assigns two errors, and this Court specified a third: (1) whether appellant was denied his right to counsel by being interrogated after invoking that right; (2) whether appellant's confession was coerced; and (3) whether appellant's trial defense counsel provided ineffective assistance. Finding no error, we affirm.

I. APPELLANT'S CONFESSION

A. *Facts*

At trial, the parties stipulated to facts surrounding appellant's confession. On 10 February 1993, Security Police investigators interviewed appellant about his involvement with illegal drugs. When the investigators expressed doubts about appellant's story, appellant requested counsel, but agreed to provide a urine specimen for testing. The interview was terminated and appellant provided the specimen. The urine specimen tested positive for the presence of a metabolite of cocaine. The results of the urinalysis were reported back to the Air Force Office of Special Investigations (AFOSI), rather than the Security Police. Agents of the AFOSI called appellant to their office on 1 March 1993 for an interview. They were unaware that, and apparently did not ask if, appellant had previously invoked his right to counsel. The AFOSI agents advised appellant of his rights to remain silent and to have an attorney. Appellant waived these rights in writing and agreed to be interviewed. Appellant then admitted snorting two lines of cocaine while at a local night club.

B. *Right to Counsel*

The Supreme Court has established a bright-line rule for police officers to follow:

> [W]e now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

Edwards v. Arizona, 451 U.S. 477, 484-85, 101 S.Ct. 1880, 1884-85, 68 L.Ed.2d 378, 386-87 (1981), *reh. denied*, 452 U.S. 973, 101 S.Ct. 3128, 69 L.Ed.2d 984 (1981). The *Edwards* rule prohibits police-initiated custodial interrogation until an attorney is *present*, not just until the suspect has had an opportunity to consult with an attorney. *Minnick v. Mississippi*, 498 U.S. 146, 151-52, 111 S.Ct. 486, 490, 112 L.Ed.2d 489, 496-97 (1990) (citing *Miranda v. Arizona*, 384 U.S. 436, 474, 86 S.Ct. 1602, 1628, 16 L.Ed.2d 694, 723-24 (1966), *reh. denied*, 385 U.S. 890, 87 S.Ct. 11, 17 L.Ed.2d 121 (1966). Although the Supreme Court has reserved judgment on whether the Fifth Amendment and the *Miranda/Edwards* line of cases apply to the military, *Davis v. United States*, —— U.S. ——, —— n. *, 114 S.Ct. 2350, 2357 n. *, 129 L.Ed.2d 362, 374 n. * (1994), the President and the military appellate courts have so applied them. *See* R.C.M. 304 and 305; *United States v. Reeves*, 20 M.J. 234 (C.M.A. 1985) (applying *Edwards*); *United States v. Tempia*, 16 U.S.C.M.A. 629, 37 C.M.R 249, 1967 WL 4235 (1967) (applying *Miranda*).

By its very terms, *Edwards* is limited to custodial interrogations. In the military, interrogation of a suspect must be preceded by a warning containing the nature of the accusation, the right to remain silent, and that any statement made may be used as evidence in a trial by court-

martial. Mil.R.Evid. 305(c). Only if the suspect is in custody, must he also be advised of his right to counsel. Mil.R.Evid. 305(d). As law enforcement officials notified appellant of his right to counsel on both occasions, and neither party presented evidence on the issue of custody, we will assume that appellant was in custody during each of the interrogations. It is undisputed that the AFOSI agents initiated the second interrogation of appellant after he had invoked his right to counsel.

The Supreme Court seems to have established two standards for appellate courts to apply when reviewing the trial court's ruling on the admissibility of a confession. If the accused claims his mental condition prevented him from freely, knowingly, and intelligently waiving his rights, then admissibility is a matter of the rules of evidence, and appellate courts apply an abuse of discretion standard. *See Colorado v. Connelly*, 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986). However, a due process issue requires *de novo* review.

> [T]he ultimate issue of "voluntariness" is a legal question requiring independent federal determination. . . . That duty . . . is not limited to instances in which the claim is that the police conduct was "inherently coercive." It applies equally when the interogation techniques were improper only because, in the particular circumstances of the case, the confession is unlikely to have been the product of a free and rational will.

Miller v. Fenton, 474 U.S. 104, 110, 106 S.Ct. 445, 449-50, 88 L.Ed.2d 405, 411 (1985) (citations omitted). The Supreme Court has not promulgated a standard for reviewing allegations of technical violations of the *Edwards* rule; however, the absence of an expression of such a standard suggests that the Supreme Court reviews such issues *de novo*. Regardless, we will apply the *de novo* standard. Although not required to do so under Article 66(c), UCMJ, in applying either standard we normally

will defer to the military judge's findings of fact unless they are clearly erroneous. *United States v. French*, 38 M.J. 420, 424-25 (C.M.A.1993); *United States v. Washington*, 42 M.J. 547 (A.F.Ct.CrimApp.1995).

The rule in *Edwards* was clearly designed to implement the Supreme Court's desire to protect an accused from the " inherently compelling pressures' of custodial interrogation." *Arizona v. Roberson*, 486 U.S. 675, 681, 108 S.Ct. 2093, 2097, 100 L.Ed.2d 704, 713 (1988) (quoting *Miranda v. Arizona*, 384 U.S. 436, 467, 86 S.Ct. 1602, 1624, 16 L.Ed.2d 694, 719-20 (1966)). The Court was concerned that an accused in police custody, "having expressed his own view that he is not competent to deal with the authorities without legal advice," would be badgered by police officers who eventually giving up that right without counsel's presence. *Roberson*, 486 U.S. at 681, 108 S.Ct. at 2098, 100 L.Ed.2d at 713 (quoting *Michigan v. Mosley*, 423 U.S. 96, 110 n. 2, 96 S.Ct. 321, 329 n. 2, 46 L.Ed.2d 313, 325 n. 2 (1975)); *Michigan v. Harvey*, 494 U.S. 344, 350, 110 S.Ct. 1176, 1180, 108 L.Ed.2d 293, 302 (1990); *see Oregon v. Bradshaw*, 462 U.S. 1039, 1044, 103 S.Ct. 2830, 2834, 77 L.Ed.2d 405, 411-12 (1983).

Although the sweeping language in *Edwards* would seem to apply to this case, we believe such a result is neither required nor would further the purpose of the rule. Appellant was released from custody immediately after he requested to speak to an attorney. For the next 19 days, appellant was neither in custody nor subject to any other conditions on his liberty, was not badgered by police, was performing duties on an Air Force installation on which two military defense attorneys were located, had sought legal counsel from a military defense counsel for a previous nonjudicial punishment, and did not contact any attorney for assistance with this accusation. We do not believe the Supreme Court meant to find an accused in appellant's position to be under such "inherently compelling pressures" as to need any special protection. We

find the AFOSI-initiated interrogation of 1 March 1993 did not violate appellant's right to counsel. *See McNeil v. Wisconsin*, 501 U.S. 171, 176-77, 111 S.Ct. 2204, 2208, 115 L.Ed.2d 158, 167-68 (1991) (suggesting the rule of *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) and *Minnick v. Mississippi*, 498 U.S. 146, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990) applies when there has been no break in custody); *United States v. Flynn*, 34 M.J. 1183, 1187-88 (A.F.C.M.R. 1992).

C. *Coerced Confession*

Appellant also asserts that the AFOSI agents coerced his confession by threatening to tell his neighbors, supposedly drug dealers, that appellant had informed on them. Appellant made no such assertion at trial. In fact, the military judge made a finding, supported by the record, that there was "no suggestions that the admissions were involuntarily obtained by coercive means."

Appellant has a duty to frame his motions with "substantial clarity and specificity." *United States v. Corraine*, 31 M.J. 102, 107 (C.M.A.1990). His motion to suppress did not raise the coercion issue. Therefore, appellant forfeited ("waived") this issue. *Corraine*; Mil.R.Evid. 103(a), 304(e); R.C.M. 905(e).

II. INEFFECTIVE ASSISTANCE OF COUNSEL

At trial, after the military judge denied the motion to suppress the confession, appellant entered a plea of not guilty. He stipulated that: the urine specimen he had provided the Security Police had been tested and found to contain a metabolite of cocaine; and the reason for his positive urinalysis was that he had used cocaine. The military judge conducted a *United States v. Bertelson*, 3 M.J. 314 (C.M.A.1977), inquiry and received assurances appellant understood the meaning of effect of such a stipulation and wanted to be bound by it. Thereafter,

trial defense counsel presented neither evidence nor argument to the court on findings. In his clemency submissions, appellant maintained his innocence of the charge. We specified whether trial defense counsel failed to provide effective assistance to appellant.

In response to the specified issue, appellant's appellate counsel have notified this Court that, despite their diligent efforts, they have been unable to locate appellant. They further claim that, since appellant refused to discuss the facts of his case in his clemency submissions, he has not waived his attorney-client relationship, and counsel for the United States should not be permitted to discuss the matter with appellant's trial defense counsel. Nevertheless, appellate defense counsel assert that there is no reasonable tactical basis for the trial defense counsel's decision not to at least argue after his client has pled not guilty. Based on the unavailability of appellant, counsel for the United States ask that we either withdrew the specified issue or advise them whether the specified issue is sufficient to authorize release of attorney-client information from trial defense counsel.

We decline to either withdraw the specified issue or to find that appellant has waived his attorney-client relationship. Under Article 66(c), UCMJ, this Court may affirm only such findings as are correct in law and fact. We believe this mandate requires us to raise, on our own, issues which might affect such findings. By specifying the issue of the effectiveness of counsel, we did not mean to imply that we found such deficiencies in counsel's performance as to overcome the presumption of competency, but merely that we were interested in appellate counsels' views. Once we specify an issue of ineffectiveness of counsel, appellant still has the burden of establishing its existence.

"Judicial scrutiny of counsel's performance must be highly deferential." *Strickland v. Washington,* 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674, 694

(1984). To sustain an allegation of ineffective assistance of counsel, *appellant* has the burden of showing that counsel's performance was deficient and the deficient performance prejudiced the defense. Counsel's errors must have been "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693 (1984); *United States v. Scott,* 24 M.J. 186, 188 (C.M.A. 1987).

Appellant has not met his burden on either prong of the *Strickland* test. Without appellant's version of the events, we are not convinced appellant has overcome the presumption that his counsel's actions "might be considered sound trial strategy." *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065, 80 L.Ed.2d at 695. Based on the record, it appears appellant's only viable defense was to win the motion to suppress. Having lost the motion to suppress, it might be sound strategy to mitigate the sentence by stipulating to the facts and, in effect, pleading guilty, without waiving the motion to suppress. Under those circumstances, we are unwilling to second-guess trial defense counsel's tactics. *United States v. Holt,* 33 M.J. 400, 411 (C.M.A.1991); *United States v. Rivas,* 3 M.J. 282, 289 (C.M.A.1977).

The findings and sentence are correct in law and fact, and we find no errors prejudicial to appellant's substantial rights. Acocrdingly, the findings and sentence are

AFFIRMED.

Chief Judge DIXON and Judge BECKER concur.

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